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 ESCONDIDO PROMENADE, LLC

UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF CALIFORNIA

LARRY MCIVER,

Plaintiff,

v.

TARGET CORPORATION dba  
 TARGET #274; COST PLUS, INC. dba  
 COST PLUS WORLD MARKET #145;  
 FRIT ESCONDIDO PROMENADE,  
 LLC; LA SALSA, INC. dba LA SALSA  
 #93; APPLEBEE'S RESTAURANTS  
 WEST, LLC dba APPLEBEE'S  
 NEIGHBORHOOD BAR & GRILL  
 #5711; TOYS 'R' US – DELAWARE,  
 INC. dba TOYS 'R' US #5633; PARTY  
 CITY CORPORATION dba PARTY  
 CITY OF ESCONDIDO #445;  
 INLAND WESTERN MDS  
 PORTFOLIO, LLC,

Defendants.

) USDC No. 08 CV 0132 IEG WMc  
 ) Complaint Filed: January 23, 2008  
 )  
 ) **MEMORANDUM OF POINTS AND**  
 ) **AUTHORITIES IN SUPPORT OF**  
 ) **DEFENDANT FRIT ESCONDIDO**  
 ) **PROMENADE, LLC'S MOTION**  
 ) **TO CONTINUE EARLY NEUTRAL**  
 ) **EVALUATION CONFERENCE**  
 ) **PENDING HEARING ON MOTION**  
 ) **TO DISMISS STATE LAW**  
 ) **CLAIMS AND DECLINE**  
 ) **SUPPLEMENTAL JURISDICTION**  
 )  
 ) ENE Conference Date: April 4, 2008  
 ) Time: 9:30 a.m.  
 ) Courtroom: C, 1st Floor  
 ) Magistrate Judge: Hon. William  
 ) McCurine, Jr.  
 )  
 ) **ORAL ARGUMENT NOT**  
 ) **REQUIRED**  
 )

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:  
 2 PLEASE TAKE NOTICE THAT Defendant FRIT ESCONDIDO  
 3 PROMENADE, LLC, hereby moves the Court for an order continuing the Early  
 4 Neutral Evaluation Conference until after the Court rules on this moving  
 5 defendant's Motion to Dismiss the state law claims asserted against it in this  
 6 action.

7 This Motion is made on the grounds that the Court should continue the Early  
 8 Neutral Evaluation Conference, currently set for April 4, 2008, until after this  
 9 moving defendant's Motion to Dismiss is heard on April 28, 2008. Because the  
 10 Motion to Dismiss seeks the dismissal of all claims in which legal damages are  
 11 sought, prior resolution of that motion is crucial to any substantive settlement  
 12 negotiations with plaintiff. If the Early Neutral Evaluation Conference is held  
 13 before the Court rules on the Motion to Dismiss, then the parties will have no  
 14 realistic chance of reaching a substantive settlement, because plaintiff has  
 15 demanded legal damages on claims that are likely to be dismissed by the Court.

16 This Motion is based upon this notice, the concurrently filed memorandum  
 17 of points and authorities, the concurrently filed proposed order, the previously filed  
 18 Motion to Dismiss (Docket Entry No. 32), all documents and pleadings on file with  
 19 the Court in this matter, and upon such oral and documentary evidence as may be  
 20 presented at the hearing of this motion, if any.

21 Dated: March 18, 2008

SCHLICHTER & SHONACK, LLP

22  
 23 /s/ - Steven C. Shonack

By: KURT A. SCHLICHTER

STEVEN C. SHONACK

Attorneys for Defendant FRIT

ESCONDIDO PROMENADE, LLC

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
MOTION TO CONTINUE EARLY NEUTRAL EVALUATION  
CONFERENCE**

**I. INTRODUCTION**

Although this action presents a familiar fact pattern to this Court—a claim under the Americans with Disabilities Act (“ADA”) and related state law claims—the nature and extent of the specific claims here makes this case a good candidate to have the Early Neutral Evaluation Conference (“ENE Conference”) continued for a short period of 45-60 days. The primary reason a continuance is sought is so the Court can rule on the Motion to Dismiss the state law claims that has been filed by this moving defendant, FRIT Escondido Promenade, LLC (“FRIT Escondido”). The Motion to Dismiss is set to be heard before Judge Gonzalez on April 28, 2008. *See* Docket Entry No. 32.

As set forth below, and discussed in more detail in the Motion to Dismiss, resolution of that motion will determine whether plaintiff will be able to pursue statutory damages against FRIT Escondido for the alleged ADA violations. If the motion is granted, then plaintiff will be limited only to the equitable remedies available under the ADA, and the parties can focus their efforts on resolving those issues. If the motion is still pending at the time of the ENE Conference, then plaintiff will demand legal damages under the state law claims that are likely to be dismissed by the Court. In that scenario, it is highly unlikely that a settlement will be reached because there will remain a substantive dispute as to the scope of plaintiff’s remedies. To maximize the possibility for settlement at the ENE Conference, the Court should order that it be continued until after the Court rules on the Motion to Dismiss and the parties have a clear understanding of the true nature and scope of the action and available remedies.

## II. PROCEDURAL HISTORY

On January 23, 2008, plaintiff Larry McIver, by his counsel Lynn Hubbard, filed suit against FRIT Escondido and seven other defendants, alleging a long list of claimed ADA violations at the Escondido Promenade shopping center in Escondido. *See* Docket Entry No. 1. Plaintiff's complaint not only includes a claim for violation of the ADA, but also appends three intertwined state law claims—alleging violation of the Unruh Civil Rights Act (“Unruh Act”), violation of the California Disabled Persons Act (“Disabled Persons Act”), and violation of certain provisions of the California Health & Safety Code.

This Court issued its order setting the ENE Conference on February 21, 2008, three days after the first two defendants in this action filed their responsive pleadings. *See* Docket Entry No. 22. The Court set the ENE Conference for April 4, 2008.

Many of the defendants, including FRIT Escondido, were granted extensions of time to file a responsive pleading. Indeed, not all of the parties have yet filed a responsive pleading. Defendant Applebee's Restaurants West, LLC, have been granted an extension to file a responsive pleading to March 24, 2008. *See* Docket Entry No. 24. Defendant Target Corporation has also not yet filed a responsive pleading or otherwise appeared in the action.

FRIT Escondido was granted an extension to file its responsive pleading to March 20, 2008. *See* Docket Entry No. 13. On March 14, 2008, FRIT Escondido filed a Motion to Dismiss the three state law claims. *See* Docket Entry No. 32. That motion is set to be heard before Judge Gonzalez on April 28, 2008.

On March 14, 2008, plaintiff served his Early Neutral Evaluation Statement, in which he demanded statutory damages under the state law claims against FRIT Escondido. Statutory damage demands were also made against each of the other defendants.

1 **III. THE COURT IS VERY LIKELY TO DISMISS THE STATE LAW**  
 2 **CLAIMS AND PLAINTIFF WILL NOT BE ENTITLED TO SEEK OR**  
 3 **RECOVER STATUTORY DAMAGES**

4 Courts in this District have consistently declined to exercise supplemental  
 5 jurisdiction over Unruh Act claims in ADA cases, per 28 U.S.C. § 1367, and, upon  
 6 motion, have dismissed such claims under Federal Rule of Civil Procedure (“FRCP”)  
 7 Rule 12(b)(1). *Oliver v. Longs Drug Stores California, Inc.*, No. 07cv2302 IEG,  
 8 2008 U.S. Dist. LEXIS 14341 at \*6-7 (S.D. Cal. Feb. 25, 2008); *Oliver v. GMRI,*  
 9 *Inc.*, No. 07cv1719 IEG, 2007 WL 4144995 (S.D. Cal. Nov. 19, 2007); *Wilson v.*  
 10 *PFS, LLC*, 493 F.Supp.2d 1122 (S.D. Cal. 2007).

11 In each case, the Court has found that there is an irreconcilable conflict  
 12 between California courts and the Ninth Circuit as to the applicability of the  
 13 “discriminatory intent” requirement of the Unruh Act. The Ninth Circuit has held  
 14 that no showing of discriminatory intent is required for statutory damages under  
 15 the Unruh Act. *Lentini v. Cal. Ctr. for the Arts*, 370 F.3d 837, 846-47 (9th Cir.  
 16 2004). California Courts, however, have disapproved *Lentini*, and substantive law  
 17 in California continues to hold that a showing of discriminatory intent is required  
 18 under the Unruh Act. In *Gunther v. Lin*, 144 Cal.App.4th 223, 252-257 (2006), the  
 19 California Court of Appeal explicitly rejected the Ninth Circuit’s holding in  
 20 *Lentini*, concluding that “the *Lentini* court’s analysis cannot be considered an  
 21 accurate statement of California law.” *Gunther, supra*, 144 Cal.App.4th at 252.

22 This presents an irreconcilable conflict between the Ninth Circuit and  
 23 California Courts as to whether a plaintiff must prove discriminatory intent to be  
 24 awarded statutory damages under the Unruh Act. When faced with these exact  
 25 same type of claims, the Court has correctly ruled that such an issue presents a novel  
 26  
 27  
 28

1 and complex question of state law that should be considered in state court and not in  
2 a lawsuit in this District as a matter of comity.

3 Furthermore, this Court has also correctly declined to exercise supplemental  
4 jurisdiction over the other state law claims, because they are so intertwined with the  
5 Unruh Act claim that they also are inappropriate for resolution in the federal forum.

6  
7 **IV. PLAINTIFF AND FRIT ESCONDIDO WILL NOT HAVE A**  
8 **MEANINGFUL OPPORTUNITY FOR SETTLEMENT UNTIL THE**  
9 **MOTION TO DISMISS IS RULED UPON**

10 As set forth above, plaintiff is seeking statutory damages against FRIT  
11 Escondido. Such damages are based entirely on the state law claims that are the  
12 subject of the Motion to Dismiss. No other legal damages are sought, and no such  
13 remedies are available under the federal law claim for violations of the ADA. If the  
14 ENE Conference is held before the Court rules on the motion, then plaintiff will  
15 likely demand a settlement that includes at least a component of the state law  
16 damages claim. FRIT Escondido has filed what it believes to be a meritorious  
17 motion to dismiss those claims and does not believe that it is legally required to pay  
18 any such damages. This unresolved situation will make it very difficult, if not  
19 impossible, for the parties to reach or approach settlement without a major  
20 concession from one side or the other. As a practical matter, this means that the ENE  
21 Conference, if held on April 4, 2008, will have a minimal likelihood of resolving this  
22 matter.

23 On the other hand, if the ENE Conference is continued until after the Court  
24 rules on the Motion to Dismiss, the parties will be in a much better position to gauge  
25 the true value of the case and participate in meaningful settlement discussions.  
26 Regardless of which way the Court rules on the motion, the ruling will have a  
27 significant impact on the parties' relative positions with respect to damages exposure

1 and settlement. If the motion is granted, then the parties can conduct negotiations  
2 based solely on the equitable remedies available under the ADA. If the motion is  
3 denied, then the parties will be able to address the entirety of plaintiff's claims. At  
4 this time, however, it is premature for plaintiff to demand that any settlement include  
5 compensation for legal damages, or for that matter, for FRIT Escondido to outright  
6 deny consideration of any such claims. Once the parties have received the Court's  
7 ruling, and know where they stand, they can fully and meaningfully participate in the  
8 ENE Conference.

9  
10 **V. CONCLUSION**

11  
12 For the foregoing reasons, FRIT Escondido prays that this Court continue  
13 the ENE Conference in this matter to a date after the Court has ruled on the Motion  
14 to Dismiss, which is currently set for hearing on April 28, 2008.

15  
16 Dated: March 18, 2008

SCHLICHTER & SHONACK, LLP

17  
18 /s/ - Steven C. Shonack

By: KURT A. SCHLICHTER

STEVEN C. SHONACK

Attorneys for Defendant FRIT

ESCONDIDO PROMENADE, LLC